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In The

Supreme Court of the United States

OCTOBER TERM, 1945

No.

WINDING GULF COLLIERIES, Petitioner,

VS:

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY. Respondents.

BRIEF OF RESPONDENT, THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI HEREIN.

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

We submit that the petition for a writ of certiorari herein should be denied for the fol-

NOTE: Numerals in brackets (-) refer to pages of Transcript of Record.
NOTE: Bold Type in brief represents emphasis by counsel.

lowing good and sufficient reasons:

FIRST:

Failure of petitioner to comply with Rule 12, Paragraph 1 and Rule 38 of the Rules of this court.

The petitioner prays that a writ of certiorari be issued by this Court (P-15) to review the decision of a Circuit Court of Appeals.[1] Neither the petition nor the brief in support of it show that any special or important reason exists for the granting of the writ by this court. The petition and supporting brief show that no federal question is involved and that the decision (137) about which petitioner complains has given proper effect to the applicable decisions of this court.

The decision was not rendered in conflict with any decision of another Circuit Court of Appeals; neither does the decision decide any important question of local law in a way that conflicts with the applicable local decisions.

The petition attempts to invoke jurisdiction in this court under Section 24(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U.S.C.A., Sec. 347), by

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[1]Board of Education etc. vs: Winding Gulf Collieries, 152 F.(2d) 382.

stating that said decision does not properly construe the law in the light of the uniform policy fire insurance law of the State of West Virginia (P. 2, etc.). This question was not presented to either the District Court or said Circuit Court of Appeals, but was first raised by petitioner by its petition to the Circuit Court of Appeals for a rehearing. (148).

SECOND:

The decision of the said Circuit Court of Appeals shows that the court has clearly applied familiar principles of insurance law as formerly propounded by this court, other Circuit Courts of Appeals, the Supreme Court of Appeals of West Virginia, and other Courts of the land.[1]

UNWARRANTED STATEMENTS IN PETITION.

The petition (P. 6-7) states:

"Under the call for the election it was

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[1]Hagen v. Scottish Ins. Co., 186 U. S. 423
New Orleans, etc. v. W. R. Grace and Co., 26 F. 2d 967
Board v. Ins. Co., 116 W. Va. 503
Thompson v. Gearheart, 137 Va. 427,
City of Norwich, 118 U. S. 468,
And other cases cited in the decision.

provided that the school building would be located at or near the Village of Winding Gulf. The officials of The Board met with the officials of Winding Gulf Colliery Company, predecessor of Winding Gulf Collieries, and they then and there had a **verbal agreement** after inspecting the premises and specifications of the contemplated building, that **such building** would be located upon lands of Winding Gulf Colliery Company, * * *"

"This parol agreement was carried into a written agreement by a deed dated the 23rd day of August, 1924, (R. 18) * * *"

There is no foundation in the record for such statements and no such assertions were made by Winding Gulf Collieries either in the District Court or the Circuit Court of Appeals.

The petition (P. 7-8) also states:

"Winding Gulf Collieries, by deed dated 15th day of August, 1929, succeeded to the rights of Winding Gulf Colliery Company (R. 124.)"

The foregoing statement is not correct because the record (54) shows that Winding Gulf Colliery Company, predecessor in title

to Winding Gulf Collieries, the petitioner, excepted from said conveyance all the property, rights and privileges granted to this respondent's predecessor by deed dated August 23, 1924. This exception was the land on which the school building was located and which was destroyed by fire and covered by the insurance in question in this case.

Other unwarranted statements contained in said petition will be hereinafter noted in the "ARGUMENT" contained in this brief.

STATEMENT OF FACTS.

Prior to August 23, 1924, The Board of Education of Slab Fork District determined that it was necessary to construct certain high schools in that district and a bond election was held for that purpose. The bond election carried and on August 23, 1924, Winding Gulf Colliery Company granted and conveyed to The Board of Education of Slab Fork District 0.517 of an acre of surface land (18). This deed is recorded in the County Clerk's office of said Raleigh County in Deed Book No. 90, at page 131 (24).

By the acts of the West Virginia Legislature for the year 1933, district boards of education were abolished in Raleigh County and The

Board of Education of the County of Raleigh was made successor thereto (42). This respondent thereby succeeded to all the rights of said district boards.

Said deed provided that the tract of land conveyed as aforesaid would revert to the grantor, Winding Gulf Colliery Company and not the petitioner, upon cessation of use thereof by respondent for school purposes (21). The petitioner bases its claim on abandonment and reversion of the land after the fire.

On the 15th day of August, 1929, (52), said Winding Gulf Colliery Company granted and conveyed numerous tracts of real estate to petitioner, excepting and reserving (54) "all property, rights and privileges heretofore conveyed by the said Winding Gulf Colliery Company by the following deeds dated and recorded in the office of the Clerk of the County Court of Raleigh County, West Virginia, to-wit:

* * * *

(13) Deed to Board of Education of Slab Fork District, dated August 23, 1924, and recorded in Deed Book 90, page 131." (54). This reference was to the deed conveying the land in question (24) from Winding Gulf Colliery Company to petitioner, Winding Gulf Collieries.

After the respondent's predecessor in title acquired the tract of land, as aforesaid, it constructed a school building thereon which was used continuously for school purposes until destroyed by fire on January 4, 1944.

On December 1, 1943, the respondent, pursuant to its statutory authority, caused the school building to be insured by the Allemmania Fire Insurance Company and other companies for a period of three years (24), and paid all the premiums thereon with public funds.

The policy covered (26) all physical structures and the contents thereof and the interest of the insured and held by the insured for educational purposes and purposes necessary or incidental thereto on the tract of surface land in question and on lands not owned in fee simple by the assured in Raleigh County.

The total amount of the loss was adjusted with this respondent at the sum of $67,201.02 (28). The adjusted amount for the Allemmania Fire Insurance Company to pay is the sum of $4,771.27 (35), but it is stipulated and agreed (28) that other insurance companies are severally liable for other amounts (34-38) making up said total adjusted loss and that

payment thereof will be governed by the final disposition of this case.

Other pertinent facts necessary to a determination of this case are stated in the opinion of the Circuit Court of Appeals (137).

ARGUMENT.

The petitioner takes the definite position that the record presents five questions, all of which relate to and have reference to the sole ownership clause contained in the statutory form of a West Virginia fire insurance contract. This clause (Petitioner's Appendix 45) is as follows:

> "This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mort-
>
> OWNERSHIP, Etc.

gage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss."

The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer.[1]

In the Melton case the court stated the law to be that "the legislature has provided a standard uniform policy for all fire insurance in this state, one provision of which is the requirement that a building be situate upon land owned in fee simple by the insured, unless it be provided otherwise by agreement in writing added or endorsed on the policy. The **law does not preclude one having less than a fee simple title to land** or one having a building even on

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[1]Kirk, et al v. Queens Ins. Co., 126 W. Va. 213, at page 218,
Hamlet v. Am. Fire Ins. Co., 107 W. Va. 687, Syl. 2,
Melton v. Aetna Ins. Co., 110 W. Va. 73, at page 77,
Hawkins v. Southwestern Mutual Fire Ins. Co., 80 W. Va. 773.

leased premises **from obtaining insurance;** but it requires that the insured put the company on notice in such instances."

There is no contention on the part of the insurance company that the contract of insurance in this case did not comply with the statute. In fact the whole contract is set out at length and states that "loss, if any, under this policy shall be adjusted with and held payable to the Board of Education of the County of Raleigh." (26). It covered property "occupied for educational purposes and purposes necessary or incidental thereto **while located on premises owned, occupied, leased or used** by the assured in Raleigh County, West Virginia." (27).

Special conditions of the policy pertinent in this case are as follows:

SPECIAL CONDITIONS

"This insurance shall not be invalidated by the existence of any mortgage or trust deed or other encumberance that may now or hereafter be in force affecting the property above described, nor because of any foreclosure proceedings being commenced or notice given of sale of any property covered by this policy by

virtue of any mortgage, trust deed, or other encumberance. The Board of Education of the County of Raleigh as is now or may hereafter be constituted **shall be deemed the owner of the property herein named,** described and covered by this policy, and no defect in the title to such property shall invalidate this policy in whole or in part.

Should any of the within described property be situate on lands not owned by the assured in fee simple this insurance shall not be affected thereby.

This policy shall not be affected by the failure of the insured to comply with any of the warranties or conditions endorsed hereon in any portion of the premises over which the insured has no control."

INTENTION OF THE PARTIES.

The Circuit Court of Appeals found **as a matter of fact** that "there was and could have been no intention on the part of the Board of Education to protect the Collieries when it insured the school building in question" (143). The intention of the one obtaining the insurance to cover the interest of another in the

property is always necessary before the insurance will extend to and cover the other party.

A policy of insurance must be interpreted according to the apparent object and plain intent of the parties thereto.[1]

In the Thompson case the Supreme Court of Appeals of West Virginia, at page 554, said:

> "In ascertaining the intention of the parties to an insurance contract, the test is what a reasonable person in insured's position would have understood the words of the policy to mean."

In the Pilgrim Laundry case the Circuit Court of Appeals (4th Cr.) said:

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[1]Kanawha Investment Co. v. Hartford Steam Boiler Inspection Co., 107 W. Va. 555, Syl. 3,
Thompson v. State Auto Mutual Ins. Co., 122 W. Va. 551 at page 554,
Pilgrim Laundry etc. v. Federal Ins. Co., 140 Fed. (2d) 193,
Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 U. S. (L. Ed.) 395,
Clements v. Clements, 188 S. E. 154 (Va.) Anno. 126 A. L. R. 349,
Thompson v. Gearheart, 119 S. E. 67, 35 A. L. R. 36.

"Irrespective of any other rules of construction the real interest and agreement of the parties **and what they intended** and meant when they entered into the contract of insurance is what must govern the court in determining the respective liabilities."

Certainly the words contained in the policy with reference to whom the loss should be paid and those stating that the Board of Education of the County of Raleigh "shall be deemed the owner of the property herein named, described and covered by this policy," were meant to cover the property of this respondent and insure its interest therein.

The petitioner insists that fire insurance is a property interest which attaches itself to the thing insured and goes with it when transferred. The City of Norwich[1] decided in 1886, is the leading case on that question and has been consistently followed. One of the latest cases following it is Donald T. Wright.[2] From the opinion in the City of Norwich at page 494, we quote as follows:

"This view is corroborated by ref-

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[1]The City of Norwich, 118 U. S. 468.

[2]Donald T. Wright, 30 F. Sup. 610.

erence to a rule of law which we suppose to be perfectly well settled, namely, that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own, and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or non-destruction; but no interest in the property. A man's interest in property insured is so distinct from the insurance, that unless he has such an interest independent of the insurance, his policy will be void."

"So where property is sold, the insurance does not follow it, but ceases to have any value, unless the insurer consent to the transfer of the policy to the

grantee of the property. In other words, the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred."

In the well considered case of Frank Brownell vs. Board of Education,[1] similar in fact and principle to the instant case, the court follows the case of The City of Norwich.[2] In the Brownell case it was contended that "Money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will, in equity inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed." The court in its opinion says of the contention and the reasons there for that:

> "These reasons may savor of laymen's ideas of equity, but they are not law– Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interest of the insured. In common parlance the buildings are in-

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[1]Frank Brownell vs. Board of Education, 239 N. Y. 369, 146 N. E. 630, 37 A.L.R 1319.
[2]The City of Norwich, 118 U. S. 468.

sured; but everyone who stops to consider the nature of the insurance contract understands that they are not. Both in the forum and the market place it is known that the insurance runs to the individual insured, and not with the land. The vendor has a beneficial interest to protect, i.e., his own. The vendee has an insurable interest and may protect himself. The trustee as such has no insurable interest, and can only act for the cestui que trust. Plaintiff may not have the insurance money collected by defendant. It is not a part of the res bargained for, and no trust relaxation exists in regard to it."

Counsel for petitioner takes the position that the phrase, "for on account of whom it may concern," appearing in the policy, attaches the contract of insurance to the thing insured and follows it in the hands of subsequent purchasers, which is the same position that counsel took in the District Court and the Circuit Court of Appeals. Their position in that regard is fully discussed in the unanimous decision of said Circuit Court (137).

We invite this court's attenton to the fact that this case was submitted to both the Dis-

trict Court and the Circuit Court of Appeals for final decision on the pleadings and stipulation of facts; that the petitioner bases its claim on three conditions subsequent to the loss. These conditions are:

(1) Cessation of use for school purposes.

(2) Abandonment. (the respondent contends that the stipulations of fact do not constitute abandonment.)

(3) Reversion.

The rights of the parties to the proceeds of a fire insurance contract are fixed at the time of the loss.[1]

We submit that the Circuit Court of Appeals was impressed with the fact that this is an equity case and that the petitioner does not

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[1]John A. Sheppard Admr. vs. Peabody Ins. Co. 21 W. Va. 368,
Hooper vs. Robinson, 98 U. S. 528,
Ins. Co. vs. Stinson, 103 U. S. 25,
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B. and L. Assn. vs. Ins. Co., 113 W. Va. 62, 166 S. E. 841,
Crook vs. Hartford Fire Ins. Co. 178 S. E. 254, Syl. Point 5.

have any equitable claim. There are legal reasons why the proceeds of this fire loss should not be decreed to the petitioner.

(1) The interest which the petitioner claims in the reversion is not the petitioner's interest. It is the interest of the petitioner's vendor, Winding Gulf Colliery Company (54).

(2) The West Virginia statute[1] in effect on the 23rd day of August, 1924, governing a school board's disposition of property was the following:

> "SALE OF SCHOOL PROPERTY–It shall be the duty of every district board of education to ascertain, at the beginning of each school year, the physical condition of all school buildings in its district and the necessity of the same for school purposes and such buildings as, in the judgment of the board, are properly located and are suitable or can with reasonable expense be rendered suitable for school purposes, shall if necessary for carrying on the schools, be retained; **all other buildings** together with the lands held in connection therewith,

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[1]Barnes' West Virginia Code Annotated, 1923, Chapter 45, Section 48.

shall with the consent of the county superintendent of schools be sold at public auction to the highest responsible bidder, by the board of education on proper legal notice and on such terms of sale as the board may order, and the proceeds of such sale shall be placed to the credit of the building fund of the district; provided, that in rural districts the grantor of such lands, his heirs or assigns, shall have the right, at such sale to purchase said land, exclusive of mineral rights, and buildings thereon at the same price for which it was sold, plus legal interest. Said board, with the consent of the county superintendent and by the same method prescribed for the sale of school buildings and lands, may also lease for oil or gas or other minerals any lands or school sites owned in fee by it, the rental or other proceeds of any such lease to be placed to the credit of the new building fund of the district."

The statute above quoted, fixing the powers of the respondent in its acquisition and disposition of property for school purposes was specifically recognized in the deed to this respondent's predecessor by the grantor stip-

ulating against liability for damage to buildings occasioned by mining (21). The stipulation recognized the respondent's statutory right to sell or remove buildings upon cessation of use for school purposes.

The district court gave much weight to the case of Board of Education for Jefferson County et al, v. Littrell, et al.[1] In that case the Kentucky statute provided "any reversionary interest in any land now used as a site for a school house shall not deprive the district of the school house or other improvements thereon". In that case the deed or contract under which the school board claimed and acquired its title was executed in the year 1888. The statute in question was enacted in 1893.

The Kentucky court recognized the well established rule "that the law which subsists at the time and place of making a contract enters into and forms a part of it as if it were expressly referred to or incorporated in its terms", but held that the statute was not applicable because it was not in effect at the time of the conveyance and to read the statute into the contract or conveyance would be

[1]Board of Education for Jefferson County, et al vs. Littrell et al (Ky.), 190 S. W. 4469.

violative of the constitutional provision against impairing the obligation of a contract.

The Supreme Court of Ohio,[1] in construing a statute similar to the West Virginia statute, supra, denied injunctive relief based on a clause in a deed of conveyance which read as follows: "It is hereby agreed and understood between the grantors and grantee that if at any time the premises herein described shall cease to be used for school purposes, the same shall at once vest in said grantors, their heirs and assigns forever".

The court held that the reversionary clause in the deed did not pass title to the **school building;** that the school building did not revert to heirs of the grantors; that it would be ultra vires on the part of the school board to convey public property except in conformity with the statute; that the school building could only be disposed of by express statutory authority; that at the time of the conveyance, the grantors were charged with knowledge of the provisions of the Ohio statute defining the statutory powers of the board, and that property devoted to public use could only be dis-

[1]Schwing v. McClure, et als (Ohio), 166 N. E. 230.

posed of in conformity with the statute.

This Court and the Supreme Court of Appeals of West Virginia have repeatedly held that contracts ultra vires and in violation of statutes and court decisions are against public policy and void.[1]

The Supreme Court of Appeals of West Virginia has constantly held[2] that **a board of education is a quasi public corporation existing only under statute, having only the powers given by statute, and such implied powers as are absolutely necessary to execute such express powers,** and that an unauthorized or an illegal contract executed by a public corpora-

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[1]Trans-Missouri Freight Assn., 58 Fed. 58,
Swan v. Swan, 21 Fed. 299,
Vidal v. Guarb's Executors, 73 U. S. 127,
Hartford Fire Ins. Co. v. Chicago M. and St. P. Ry. Co., 175 U. S. 91,
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[2]Herald v. Board of Education, 65 W. Va. 765, 65 S. E. 102,
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Dooley v. Board of Education of Cabin Creek District, 80 W. Va. 648, 93 S. E. 766.

tion is incapable of enforcement; that it is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it.

The Supreme Court of West Virginia has also specifically decided that the power of a board of education of the state to take out insurance is strictly limited.[1] Assuming that petitioner had a reversionary interest in the building at the time of the loss, yet respondent had no power, if it had desired to do so, to insure such an interest.

The Circuit Court of Appeals for the Second Circuit, in the case of **New Orleans, etc. v. W. R. Grace and Co.,** supra, clearly stated the law with reference to the intent of the party effecting the insurance to be as follows:

> "Where language of policy taken out 'on account of whom it may concern,' when read in the light of existing circumstances, shows that the person claiming the benefit **was not such a person as those effecting the policy had in contemplation,** his claim will be disallowed, though he might be within the description."

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[1]Board of Education v. Ins. Co., 116 W. Va. 503.

In reading the policy as a whole, in our case it is clear that this respondent at the time it obtained the insurance had no intention to insure any interest in the property destroyed by fire except the interest of the public which it represented.

CONCLUSION.

The objection of petitioner to the Circuit Court's application of the rule in the cases of New Orleans and South American S. S. Co. v. W. R. Grace and Co., supra, decided by the Circuit Court of Appeals for the Second Circuit and Hagan v. Scottish Union and Nat. Ins. Co., supra, decided by this court, is untenable. The decision of which petitioner complains is in conformity with the holdings in those cases.

Had the conditions subsequent, cessation of use for school purposes, abandonment and reversion upon which the respondent bases its claim, preceded the loss without a transfer of the insurance contract by the insurer to the respondent, it can be readily seen that under the express terms of the contract that there would have been no insurance on the building at the time of the loss.

Under the decision of The City of Norwich,

supra, the insurance contract would also have been terminated. Thus, it clearly follows that the petitioner is asking this Honorable Court to revolutionize the insurance laws of the United States and render the purpose and intent of all insurance contracts now in effect under existing laws, a nullity.

We, therefore, respectfully submit that the relief prayed for in the petition should be denied.

CLAY S. CROUSE and
GROVER C. TRAIL,
Counsel for Respondent,
The Board of Education of
the County of Raleigh,
West Virginia.

MAY 8 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1074

WINDING GULF COLLIERIES, *Petitioner*,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents*.

REPLY BRIEF ANSWERING BRIEF OF RESPONDENT, THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. W. MAXWELL,
Beckley, West Virginia,
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FLOYD M. SAYRE,
J. W. MAXWELL,
G. BRAX LYNCH,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1074

WINDING GULF COLLIERIES, *Petitioner,*

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FOREWORD.

Because of the deceptive presentation of the facts attending the case, as well also as certain distorted and in-

correct applications of well recognized principles of law, as the same are stated in respondent's opposition brief, we deem it our duty to this Court to direct attention to these material and misleading aspects.

CONCERNING STATEMENT OF FACTS ASSERTED IN RESPONDENT'S BRIEF.

Under the heading, "UNWARRANTED STATEMENTS IN PETITION," the respondent quotes in its brief, a garbeled excerpt from a paragraph of the petition for certiorari, filed herein, as follows: * * * "The officials of The Board met with the officials of Winding Gulf Colliery Company, predecessor of Winding Gulf Collieries, and they then and there had a verbal agreement, after inspecting the premises and specifications of the contemplated building, that such building would be located upon lands of Winding Gulf Colliery Company, * * *". Then they say, "There is no foundation in the record for such statement and no such assertions were made by Winding Gulf Collieries either in the District Court or the Circuit Court of Appeals." This is a distortion of the facts. Contrary to respondent's statement, the assertion was most emphatically made, both in the District Court and the Circuit Court of Appeals. The District Court in its finding of fact, (R. 93) for all practical purposes, stated this fact as we, in our petition stated it. In our brief filed in the Circuit Court of Appeals, under the title, "Statement of

Facts," we set forth in clear and unmistakable language, the factual situation, which respondent now here says was never made.[1]

We direct the Court's attention to the fact that this case was submitted for final decision upon an agreed statement of facts. (R. 98-104). It was heard in the lower court and, necessarily, upon appeal, by express agreement, by stipulation of the parties, among other things, to the effect that the allegations in the pleading which were not traversed

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[1]The statement of the disputed fact in our brief filed in the Circuit Court of Appeals is in these words:

"The Board sought a site on which to build the contemplated building. The plans for the building contemplated were drafted and The Board of Education of Slab Fork District exhibited these plans to the officials of the Winding Gulf Colliery Company, immediate predecessor to defendant, Winding Gulf Collieries.

The Winding Gulf Colliery Company, having seen the plans and ascertained the character of building contemplated, agreed to furnish the site on its lands. Pursuant thereto, on the 23rd day of August, 1924, the Winding Gulf Colliery Company executed a deed to The Board of Education of Slab Fork District, for the use by The Board of approximately one-half acre of surface land, a copy of which deed is exhibited with Winding Gulf Collieries' answer. This deed was executed upon the consideration of and 'especially subject to' a covenant in said deed as follows:" (Here the reversionary clause was quoted).

would be considered by the court as established.[2] Paragraph 1-A (R. 61) of the amended and supplemental answer of the petitioner affords the supporting facts on which the questioned statement was made. There was no pleading traversing the allegations of Paragraph 1-A of the amended and supplemental answer. Abundant foundation for the foregoing criticized statement will be found in that paragraph, which we reproduce in the footnote.[3] We feel and submit that

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[2]The exact stipulation is as follows:

"The case shall be submitted for final decision on the merits in the District Court of the United States, for the Southern District of West Virginia, upon the bill of interpleader and exhibits therewith filed, the answer of The Board of Education of the County of Raleigh and exhibits therewith filed, the original and amended answer of Winding Gulf Collieries and exhibits therewith filed. Said answers, respectively, shall be deemed to be traversed only on the allegation of fact in so far as the allegations of the answers of the claimants conflict respectively, and as to such conflict only, the same shall be deemed to be traversed."

[3] "1-A.

And now by way of amendment and for further answer to said bill of interpleader, this respondent says that before the execution of the deed described in Paragraph 1 herein, on, to-wit, the 26th day of April, 1924, and at a regular meeting of The Board of Education of Slab Fork District in the County of Raleigh, an order was made and entered of record authorizing a vote to be taken by the legal voters of Slab Fork District of Raleigh County, West Virginia, upon the question of the issuance and sale of $130,000.00 of bonds of said district, for the purpose of determining whether or not said bonds should be issued in contemplation of the establishment in said district, among other things, of 'a graded, junior high school and senior high school

there was and is no misstatement in the petition, as indicated by this quotation, and that the quotation contained

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building to be constructed, furnished and equipped in or near the Town of Winding Gulf in said district, and, if necessary, suitable grounds to be purchased on which to place the same;' that said election was accordingly called and said question was submitted to a vote of the people of Slab Fork District on the 27th day of May, 1924; that at said election sixteen hundred (1600) votes were cast in favor of the issuance of said bonds and seven hundred eighty-six (786) votes were cast against the issuance of said bonds, and at a subsequent meeting of said Board of Education, to-wit, on the 2nd day of June, 1924, said vote was duly canvassed by said Board of Education in all respects in manner and form as provided by law and the result thereof was duly and legally determined, as hereinbefore alleged, and said bonds were thereupon duly authorized and directed by said Board of Education to be sold, and pursuant thereto and in accordance therewith, the same were thereafter and before the 23rd day of August, 1924, as this respondent is advised and upon such information alleges the fact to be duly sold; that the lands described in Paragraph I hereof are situated 'in or near the Town of Winding Gulf' in said Slab Fork District, and conformed to and with the place designated for the location of such high school described in the call for such said bond election; and that at the time of the execution of said deed described in said Paragraph I, it was the intent, both of the grantor and the grantee, as this respondent is advised and upon such information alleges the fact to be, to build and construct upon said lands said building in accordance with and pursuant to said bond election and to establish thereon